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No. 06-497

IN THE

Supreme Court of the United States

POTOMAC ELECTRIC POWER COMPANY, *ET AL.*,

Petitioners,

v.

BRIAN A. MASTRO,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The issue decided by the D.C. Circuit in this case is a classic example of the type of fact-bound question that this Court does not exercise its certiorari jurisdiction to review: The court held that respondent Brian Mastro had presented enough evidence in support of his Title VII claim of reverse racial discrimination against petitioner Pepco to survive summary judgment. The court's over 20 pages of discussion of Mastro's Title VII claim exhaustively reviewed the evidence, described the legal principles developed by the D.C. Circuit in applying Title VII's prima facie case analysis to reverse discrimination claims on summary judgment, and concluded that Mastro had presented sufficient evidence to attack Pepco's proffered explanation for firing him and create a genuine issue of material fact as to whether he had been discriminated against because he is white.

Pepco's Petition for Certiorari does not purport to identify any flaw in the D.C. Circuit's discussion of any of the issues it actually addressed in its opinion, all of which concerned the application of Title VII to the particular facts of this case. Instead, Pepco raises an issue that the D.C. Circuit did *not* decide: whether a single piece of evidence, which was discussed in two paragraphs of the court's opinion, was admissible under Federal Rules of Evidence 408 and 403. The evidence in question was an expired consent decree that had required Pepco to take affirmative steps benefiting African American employees. The D.C. Circuit stated that it ascribed "some significance" to the consent decree because "a reasonable jury could believe it might encourage Pepco management to treat minority employees in a preferential manner." Pet. App. 12A.

The court's opinion, however, did not address challenges to the admissibility of the consent decree, for the simple reason that Pepco did not object to the admissibility of the decree either in the trial court or in its brief in the D.C. Circuit. Pepco failed to object even though the decree was among the

evidence Mastro proffered in the district court in his opposition to Pepco's motion for summary judgment and was relied on in Mastro's opening brief in the D.C. Circuit. Only after the D.C. Circuit ruled against it did Pepco belatedly raise the evidentiary issue in its petition for rehearing, which the D.C. Circuit denied without comment.

Even if the issue had been properly raised and decided below, Pepco's Rule 408 argument is patently meritless because it is based on an obvious misreading of the plain language of the rule, which renders a settlement or settlement offer inadmissible only to prove the validity of *the claim that is the subject of the settlement or offer*. Of course, the consent decree here was not offered as proof that Pepco was liable on the claims that the consent decree settled (which were claims of discrimination against African American employees), so Rule 408 does not apply. Pepco's Rule 403 argument, which requests that this Court engage in the first instance in a fact-specific balancing of the probative value of the consent decree against its possible prejudicial impact, fails to identify any important question of federal law suitable for review by this Court.

Finally, Pepco wrongly contends that admitting the consent decree as evidence supporting Mastro's claims would conflict with the Sixth Circuit's 26-year-old decision in *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980). *McCall*, however, had nothing to do with the admissibility of a consent decree as evidence of a motive to discriminate, but decided a different issue altogether: whether nonparties to a Title VII consent decree could challenge the *decree itself* as a violation of their own rights under Title VII. Even assuming that the Sixth Circuit's negative answer to that question survives subsequent decisions of this Court entertaining exactly such challenges, *McCall* has no bearing on this case, which does not involve a claim by Mastro that the expired consent decree itself violated his rights.

In sum, the issues decided by the D.C. Circuit in this case are no more than fact-specific applications of Title VII law that Pepco does not even claim were erroneous. The evidentiary issues Pepco asks this Court to address were not decided below because Pepco did not raise them, and they are in any event wholly meritless. This Court should deny certiorari.

STATEMENT OF THE CASE

Pepco largely confines its statement of the case to a description of the procedural history and avoids discussion of the facts, which are exhaustively described in the D.C. Circuit's opinion. Rather than rehearse those facts, we refer the Court to the opinion. We note, however, that Pepco's assertion that it fired Mastro "for failing to tell the truth about an African American subordinate's absence from work" (Pet. 4) cannot be accepted as an accurate statement of "fact" at this stage in the proceedings, where the facts must be construed in favor of Mastro as the opponent of Pepco's summary judgment motion. As explained at length in the D.C. Circuit's opinion, Mastro's evidence, if accepted, would establish that he did tell the truth, that Pepco's reliance on his alleged untruthfulness as the basis for his termination was a pretext for racial discrimination against him because he is white, and that African American employees would not have been terminated for similar claimed infractions. In short, the reasons for Mastro's termination have not been established as a matter of fact in this case. Rather, the court below determined that there is a genuine issue of fact over precisely that issue.

Pepco's statement of the case also omits a key procedural matter: the identification of when and how the issues it now presents were raised and decided in the courts below. That is no mere oversight, for, as explained further below, Pepco's current argument that the expired consent decree that the D.C. Circuit considered as part of the evidence supporting Mastro's claim is inadmissible was not raised by Pepco either in the trial court or the court of appeals, and was not decided by the D.C. Circuit.

REASONS FOR DENYING THE WRIT

I. The Evidentiary Issues Pepco Asks This Court to Decide Were Neither Raised Nor Decided Below.

The D.C. Circuit's opinion can be searched in vain for any holding on the evidentiary issues proffered by Pepco in its Petition for Certiorari. Nowhere did the Court address Federal Rules of Evidence 408 or 403, for the simple reason that the admissibility of the consent decree was not contested by Pepco either in the district court or in the D.C. Circuit. Mastro presented evidence of the consent decree in his opposition to Pepco's motion for summary judgment, and Pepco failed to argue that the evidence was not admissible; hence, the decree was, without objection, considered by the district court when it granted Pepco's motion for summary judgment. *See* Pet. App. 13B. Similarly, Mastro cited the consent decree in his brief on appeal in the D.C. Circuit, and Pepco's merits brief did not argue that the D.C. Circuit should ignore the decree because it was inadmissible. Pepco first argued that the decree was inadmissible in its rehearing petition, which the D.C. Circuit denied without comment.

It is firmly established that this Court ordinarily does "not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (internal quotation marks omitted). In addition, "[i]t has been the traditional practice of this Court ... to decline to review claims raised for the first time on rehearing in the court below," *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari), except where the lower court actually decided the issue or the issue could not have been anticipated until after the lower court ruled, neither of which was the case here. Moreover, the general rule in the D.C. Circuit is that issues first raised in a petition for rehearing are waived, *see Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991), so there can be no suggestion that the D.C. Circuit somehow implicitly decided the issues Pepco presents to this Court simply because Pepco included

them in its rehearing petition. Because the issues Pepco now raises were neither raised nor decided below, this Court should not now entertain them.

II. The Federal Rules of Evidence Do Not Bar Admission of the Consent Decree Under the Circumstances of this Case.

Pepco places principal reliance on Federal Rule of Evidence 408 in arguing that the expired consent decree may not be admitted in evidence to support Mastro's claims. Rule 408 provides in pertinent part that: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise *a claim* which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of *the claim* or its amount." (Emphasis added.)

As the text of the rule makes clear, it is triggered only when there was a settlement or offer to settle a particular disputed claim, and the settlement or settlement offer is then offered as evidence of liability for (or invalidity of) *that claim*. Only under those circumstances does the rule bar admission of the evidence. Here, of course, the claim that was settled by the expired consent decree was a claim that Pepco had discriminated against a class of African American employees. Mastro is not offering the decree as evidence that Pepco was liable on *that claim*. Hence the rule by its terms does not apply.

One of the cases Pepco itself cites, *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), illustrates the point. In that employment discrimination case, the defendant offered the plaintiff a new job in an effort to settle the discrimination clam that was at issue in the case, and the court held that because the settlement offer pertained to the claim at issue, the settlement offer could not be used as evidence with respect to the amount of *that claim*, based on the plain language of Rule

408. Pepco's Petition misleadingly states that *Pierce* illustrates "the improper use of a *previously entered settlement agreement* to prove an employer's liability for a *subsequent alleged discrimination*," Pet. 7 (emphasis added), but that description is completely off the mark. The settlement offer (not agreement) in *Pierce* came *after* the discrimination in the case and was offered as evidence with respect to liability for the very claim of discrimination that the defendant sought to settle, not, as here, a different claim.

None of the Rule 408 cases Pepco cites holds that a settlement offer or agreement is inadmissible as proof with respect to a claim other than the claim that was the subject of the settlement (or proposed settlement), for the simple reason that the clear language of Rule 408 does not extend to such evidentiary uses of settlement agreements. Indeed, the rule expressly provides that it "does not require exclusion when the evidence is offered for another purpose"—that is, a purpose other than proving "liability for or invalidity of *the claim*" that was the subject of the settlement or offer. Fed. R. Evid. 408 (emphasis added). Pepco's argument that the rule should be extended beyond its terms in light of the strong policy favoring settlement (Pet. 8-13) is unsupported by citation of any authority applying Rule 408 to preclude evidentiary uses of settlement agreements that fall outside the plain language of the rule.

Beyond its complete misreading of Rule 408, Pepco also asks this Court to consider whether the consent decree should have been excluded under Rule 403 on the ground that its probative value was outweighed by its prejudicial impact (another issue not considered or decided by the D.C. Circuit in this case). Ironically, the principal authority Pepco cites to support this argument is another decision of the D.C. Circuit, *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997), *vacated and remanded on other grounds*, 527 U.S. 526 (1999). Pepco's citation of *Kolstad* establishes that the D.C. Circuit is fully aware of and sensitive to Rule 403 con-

cerns and properly applies the rule when the issue is presented to it (which Pepco failed to do here). *Kolstad* thus refutes any suggestion that the D.C. Circuit applies Rule 403 in a manner that conflicts with the law of other circuits. Beyond that, *Kolstad* illustrates that the application of Rule 403 turns on the impact of specific evidence in light of the particular facts and circumstances of individual cases, a fact-bound inquiry unsuited to review by this Court. In short, Pepco's citation of *Kolstad* demonstrates that the Rule 403 issue does not merit exercise of this Court's certiorari jurisdiction.

Aside from *Kolstad*, Pepco's citation of cases under Rule 403 is limited to a 15-year-old, nonprecedential Tenth Circuit decision and three district court decisions, two of which are unpublished. Suffice it to say that such citations do not establish a conflict among the courts of appeals with respect to an important question of federal law. Moreover, all the cases show is that the balance of factors under Rule 403 may sometimes lead to exclusion of evidence of a consent decree, depending on the facts of particular cases. Even if the D.C. Circuit had been presented with and decided a Rule 403 question in this case, a decision that Rule 403 does not bar admission of the consent decree on the particular facts of this case would not conflict with decisions balancing probative value and prejudicial effect in other circumstances.

III. Pepco's Claim That the Decision Below Conflicts with the Sixth Circuit's Decision in *EEOC v. McCall Printing Corp.* Is Specious.

In a final attempt to demonstrate that this case presents some kind of conflict among the circuits, Pepco dredges up the Sixth Circuit's 1980 decision in *EEOC v. McCall Printing Corp.*, 633 F.2d 1232. Even if there were some conflict between the decision below and *McCall*, it would be a stale and shallow circuit split at best. But the issue in *McCall* was so different from the issue Pepco raises in this case that any claim of a conflict is completely groundless.

Unlike this case, *McCall* did not involve the use of a consent decree as evidence of a defendant's discriminatory state of mind in a subsequent case involving disparate treatment of an individual employment. Rather, the issue in *McCall* was whether employees who were not parties to a court-approved consent decree could bring a Title VII action claiming that the consent decree itself violated their rights. The Sixth Circuit's holding was that "that conciliation agreements resulting in consent decrees may not be considered independent acts of discrimination, as a matter of law, unless there are allegations of bad faith in making the agreement, that is, allegations that the agreement was not a bona fide attempt to conciliate a claim but rather an attempt to bestow unequal employment benefits under the guise of remedying discrimination." 633 F.2d at 1238. Because this case, unlike *McCall*, involves no claim that the consent decree itself was an independent act of discrimination, the decision below cannot possibly be said to conflict with *McCall* in any way.

In any event, *McCall*'s holding is apparently at odds with this Court's subsequent recognition in both *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986), and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), that entry of a Title VII consent decree resolving the claims of one group of employees does not preclude other employees from challenging the decree as a violation of their own Title VII rights. Indeed, the Sixth Circuit itself, in *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), recognized subsequent to *McCall* that nonconsenting employees could challenge a consent decree as a violation of their own rights, *see id.* at 484, a point on which the Supreme Court agreed when it affirmed *Vanguards* in *Local No. 93*. This Court need not, however, consider whether *McCall* survives *Local No. 93* and *Stotts*, because the issue is not presented in this case.

IV. The Decision Below Is Interlocutory.

As if there were not enough reasons to deny certiorari in this case, denial is also appropriate because the decision below is not final, but involves a remand for further proceedings, including a trial on the merits. This Court generally "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (citing *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986)).

Here, the interlocutory posture of the case strongly counsels against a grant of review now. Not only does it remain to be determined whether Mastro will ultimately prevail on his claims, it is also as yet unknown—and unknowable—what evidence will be admitted at trial (assuming that the case is not resolved without trial). There are any number of possible outcomes that could avoid altogether any need to consider the evidentiary issues Pepco raises, and there are no pressing reasons why this Court should depart from its ordinary policy of deferring review until the case has been finally decided.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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